Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 2000

DONALD BOYANOWSKI AND DOROTHY BOYANOWSKI,

Petitioners

CAPITAL AREA INTERMEDIATE UNIT; JOHN NAGLE; AND ED FRYE;

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Can a U.S. Appeals Court set a jury verdict aside on factual grounds, without reviewing the underlying transcript.

2.) Can averments of fraud or dishonesty by state actors constitute due process violations.

3.) Is there a protectable due process right to engage in a business occupation under "Stigma plus" circumstances free of intentional state interference.

4.) Did the U.S. Court of Appeals For the Third Circuit properly apply the doctrine of "predictability" in reversing the jury's verdict for civil conspiracy.

5.) Should rule 4.2 of the Pennsylvania Rules of Professional Conduct, based upon the "Model Rules of Professional Conduct", be declared void as against public policy.

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Petitioners Donald and Dorothy Boyanowski respectfully request that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Third circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit was filed on June 14, 2000 (App. A). The relevant opinions of the United States District Court for the Middle District of Pennsylvania were filed on April 27, 1998 (App.B) and May 21, 1997 (App.C).

STATEMENT OF JURISDICTION

The Third Circuit opinion was filed on June 14, 2000. No petition for rehearing was sought. The District Court opinions were filed on April 27, 1998 and May 12, 1997 respectively. No motions to vacate or rehear were filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part "nor shall any state deprive any person of life, liberty, or property, without due process of law..."

Rule 4.2 of the Rules of Professional conduct for the Commonwealth of Pennsylvania provides in pertinent part:... "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter,..."

STATEMENT OF THE CASE

The basic issues in this request relates to standards governing the standard of review by appeals courts where a fact-based decision is made without review or resort to the trial record. Related, and just as fundamental an issue, was the appeal's courts' decision to ignore an issue raised by petitioner in a cross appeal ie., whether the District Court erred in granting a motion in limine against using crucial material evidence based on Pennsylvania Rule of Ethical Conduct 4.5. Lastly, the law on "stigma plus" due process cases and the doctrine of predictability where a federal court decides what a state court will or would hold is at issue.

A.) Background

Petitioners are Don Boyanowski, a former Transportation Director for respondent Capital Area Intermediate Unit (CAIU) and his wife Dorothy who was an independent contractor driver for the CAIU. Unhappy with CAIU practices Don invested extensively in setting up a competing private transportation company with the CAIU. Respondent Nagle was the CAIU executive director, and Frye was his assistant. The CAIU is made up of the member school districts that comprised the customers Boyanowski was going to. The respondents publically castigated and attacked Boyanowski and accused him, falsely, ask they later admitted under oath, of being a criminal. But they did far more. They held meetings with Don's customers through control of agendas and publically mandated meetings only they had the power to call. They threatened others with the loss of their livelihood, including following through on precluding any work for petitioner Dorothy Boyanowski which the respondents admitted on the record below, was for the purpose of discouraging and dissuading Don Boyanowski from going ahead as a competitor. They also, accused Don Boyanowski of fraud, saying he had intentionally run-up the cost of the CAIU budget

when he was Transportation Director by, among other things, illegally "padding" miles. This meant he was endangering the lives of special needs children, and using them to create conditions he could exploit when he retired. When the respondent Nagle testified, he admitted under oath that these allegations were false and that there wasn't one thing Boyanowski had done improperly in his government service. Frye was similarly apologetic in admitting his wrongs. But the respondents also testified to, as did petitioners and other witnesses, to many actions, plans, and meetings by respondents, including their Board, one member of whom testified as to the depth and extent of the conspiracy to stop Boyanowski. During the discovery phase of the underlying case, petitioners' counsel received a phone call from a person named William Jacobi who ran the data processing unit at the CAIU. He wished to talk and counsel met with him. Jacobi indicated he had let it be known at the CAIU that he felt many dishonest things were going on in the effort to stop Boyanowski. He was told before he began that counsel would listen to him, but that opposing counsel and the opposing parties would undoubtedly learn of his whistle blowing. Jacobi said he did not want to be represented by the respondents' counsel, that he was threatened that serious repercussions would follow if he revealed what he knew to anyone but respondents' counsel, that he wanted to retain petitioners' counsel, and that he was aware personally that his superior's job (a Mr. Zimmerman, who was permitted to testify) had been directly threatened if he revealed what he knew. Petitioners' counsel did listen to Jacobi, advised him that he knew of no one who had to accept any attorney not of his choice, and to consult another attorney (which he did). Before listening to Jacobi he advised him he would insist on revealing the contents of their meeting. Jacobi was in complete agreement. Upon motion the District Court held that Rule 4.5 of the Code of Professional Conduct had been violated by Petitioners'

counsel. Jacobi, who had kept notes, and had extensive evidence of improper misconduct by respondents, was prevented form testifying although his testimony related to matters of public policy conducted by public officials, at tax payers expense, to avoid discussion and competition from a highly qualified private adversary in the interests of children and public education. Petitioners argued that this rule should not, particularly in matters appertaining to public trust and business, he used to threaten knowledgeable witnesses into silence by among other things threatening their employment. With the exception of the motion in limine all of this was put before a federal jury. Well educated and hardworking they found in large part for petitioners. Respondents filed post trial motions. They did not cite to the record, or use the trial transcript which they ordered. They made no motion to enlarge time until they could obtain the entire transcript. The District Court in its opinion (App.B) noted the lack of a record from respondents on 12 separate occasions. After the trial court denied respondents' post trial motions, they appealed to the Third Circuit. During oral argument the respondents' counsel was asked why, if respondents were claiming a paucity of evidence to support the jury verdict against them, they had not sent the trial record down for review. The panel advised or implied in so many words that in reviewing such a claim, they would need to do a de novo review of the record. Respondents' counsel remarked that he didn't realize he needed to do that because, since he ordered the transcript, it was available for the court in the middle District Clerk's office. When petitioners counsel addressed the Court, he was questioned as to why he did not cite prolifically to the record. Petitioners explained that he was aware of the respondents weakness in not sending the record down, and only providing limited excerpts, that because of a recent heart attack which required a request for enlargement anyway (which the appeal court graciously granted) that a decision had been made not to

do the opposing parties' work for them. They were the appellants in the appeal and had cited excerpts of the record but were doing that against a claim that there was no evidence in the record to support the jury's verdict. Petitioners' counsel pointed out that he had provided the complete transcriptions of 4 major witnesses that contained numerous examples of stigma plus testimony. The Appeal Court panel nonetheless directed appellee (petitioners') counsel to go back and cite to the record specifically in spite of the significant portion of the trial record already produced by petitioners. At this point petitioners' counsel understood the panel to be directing citations in the record to the issue of the civil conspiracy verdict only and the Third Circuit opinion corroborates that point. Petitioners did so in the few days provided and the Third Circuit so acknowledges but calls the supporting evidence "thin." What is evident is that the Third Circuit did not review the trial transcript, and did not review even the transcripts provided by petitioner, who in their argument, intentionally hoping to win by default, were expecting the respondents appeal to be dismissed for failure to adhere to the standard of review in such cases ie where the allegation on appeal is one of insufficiency. Petitioner was expected to carry the burden, as appellee, of proving their case. Appellant enjoyed the luxury of, by and large, a conclusory appeal. The jury's verdict, after a whole week of trial and hours of deliberations, was set aside on grounds of insufficiency of the evidence ie that petitioners only presented evidence of a defamation claim and no more, and in spite of petitioners' request to the Appeal Court to read the whole record, for which he was admonished, and despite respondents (appellants) failure to transmit the record to the Appeal Court, the panel said, in effect, that the district Court instructions were not sound, (even knowing the District Court did not have a record to consult because respondents' never supplied one) the Third Circuit stood the commonly understood standard of review that claims of insufficient evidence require a

de novo review of the record on its head, and should have at least required the availability of the record before reversing a jury's findings of fact and a trial courts understanding of lawful instructions based upon those facts. The Appeals Court panel also dismissed petitioners $150,000.00 supplemental claim verdict based on the abuses suffered by Dorothy Boyanowski based upon an unclear legal doctrine which allows cases to be dismissed based upon predictions of what state courts would do. This doctrine is not defined in the Third Circuit opinion. The Appeal Court did not properly apply or interpret this Court's opinion on substantive due process claims nor did it apply its own law properly because it did not review the record in this case. "We similarly view Meyer (referring to Meyer v. Nebraska, 262 U.S. 390 (1923) as too slender a reed upon which to rest Mr. Boyanowski's substantive due process claim." Further on, the Appeal panel, in conclusory fashion says "Equating a defamatory statement that leads to a third parties not extending a contract to a frustrated plaintiff with the deprivation of the plaintiffs legal right to engage in the common occupation of life in a manner protected by the Fourteenth Amendment goes to far." Well of course it does, depending on what was said or done. But how can this form of an insufficiency argument apply without consulting the entire record in a case like this. If the conclusory preamble to their dictum is eviscerated and the following language substituted, concocting false information about a competitor, soliciting support to oppose him from the very group that constitutes your governing body, dismissing his wife after 27 years of spotless loyal service as an admitted way to harm him and frighten him away, changing past records and submitting false information to customers to bolster your argument that he committed a fraud while working for you, all to ensure his success against you after retirement, all criminal acts, all indictable offenses, and all false, coupled with falsifying budget data, threatening staff members not to be

truthful, and threatening their job security do not amount to due process violations as interferences with a citizens right to launch and operate a business, then there is little use for any federally guaranteed rights. It is also amusing to see constant references to state tort law as possible remedies for these obvious wrongs when virtually every alleged tort is protected by sovereign or official immunity blithely referred to as a "state law question." Lastly, the Appeals Court did not even refer to petitioners' issue regarding Professional Ethics Rule 4.2. An analysis of this rule and the effect of excluding the affected testimony alone, with no other, would debunk the theory that the underlying case was a run of the mill defamation tort claim. Mr. Jacobi's entire deposition was made part of the record before the Appellate and District Courts. The Third Circuit made no mention of the excluded evidence, or the Rule, in its opinion.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE APPEALS COURT REVERSED A DISTRICT COURT AND IGNORED A JURY VERDICT WITHOUT REVIEWING THE TRIAL TRANSCRIPT SETTING A DANGEROUS PRECEDENT IN VIOLATION OF ESTABLISHED PRACTICES AS TO THE STANDARD OF REVIEW IN CASES WHERE INSUFFICIENT EVIDENCE IS RAISED AS THE BASIS OF THE APPEAL.

A search of Third Circuit cases did not reveal a single case where there was even an implication that less than a thorough and complete review of the underlying record was conducted in situations were there were allegations of insufficient evidence. Petitioners conducted a LEXIS search using a number of formats. The most successful was "insufficient evidence" w/5 standard w/5 review w/30 record."

Virtually every case petitioner could find on this subject revealed only that "thorough" and complete" reviews of "evidence" and the "record" were conducted in such cases before a decision was reached. See Williams v. Sullivan 970 F. 2d 1178 (1992), Limbach Company v. Sheet Metal Workers, 949 F.2d 1241(1991) at 1247, Green v. Ford Motor Co., 1996 U.S. Dist. LEXIS 4102, Tarket v.Congoloeum Corp, 156 F.R.D. 608 (1994), Chase Manhattan Bank v. Nible, 1991 U.S. Dist. LEXIS 4671, City of Bergen v. Dole, 620 F.Supp 1009 (1985). The language is always similar, and although there is no case directly on point from any Circuit that petitioner can find, in every case where a standard of review is directly or indirectly referenced (as related to insufficient evidence), the inference or meaning is always the same. The standard of review calls for a thorough and de novo review of the record just as respondents' counsel was told. This case is the only case known to petitioners, or any member of the bar consulted, where the court decided a matter based upon allegations of insufficient evidence without a review of the record.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE LAW IS UNCLEAR FROM CIRCUIT TO CIRCUIT AS TO WHETHER AVERMENTS OF FRAUD OR DISHONESTY BY STATE ACTORS, COUPLED WITH OTHER ACTIONS OF INTERFERENCE BY STATE ACTORS CONSTITUTE DUE PROCESS VIOLATIONS IN SITUATIONS WHERE CITIZENS ARE ATTEMPTING TO START UP OR CONDUCT A BUSINESS.

What happened here is quite simple. Petitioner retired from respondents' employ. Respondent is a municipal entity in the business of providing a multitude of services to its member school districts. It does this in some cases, like transportation, by

having to compete for that work, at least in an ideal situation. After petitioner Don Boyanowski retired, he, at great expense and trouble formed a business and set about soliciting work from the school districts. This was new. It created tremendous interest among the respondents' member school districts. They began to flock to petitioner. Respondents then began to engage in a number of actions to destroy petitioners' business opportunity. Respondents changed records and statistics, they misrepresented facts, reports, and budget figures to create the falsehoods that petitioner had manipulated even the routes, time of pick-up, drop of, and the number of miles on the road, of small and helpless special needs children, while Transportation director for respondent, in order to lay the groundwork for his business. Petitioner was called a criminal and accused of fraud. He was financially and emotionally destroyed. His wife, a lovely woman who gave 27 years of perfect service to the respondent was not only refused an opportunity to work for respondent but respondent directly prevented her from working for another contractor with respondent. The Third Circuit, summarily, and without a review of the record, which they expressly advised respondents counsel on the need for but did not require his compliance, conclusively, without the facts, called this a mere defamation claim. The District Court also admittedly did not have the record because respondent never supplied it for the District Court either, but the District Court (See App.B) with an experienced federal judge at the helm, who sat through the entire trial as the jury did, saw petitioners' interests as akin to a liberty interest, and saw petitioners as the victims of "stigma plus" circumstances at the hands of the respondents. Petitioners are not judges. They only know or believe that they are free to start a business. But under the limited facts visited by the Third Circuit which consisted of reading the respondents' limited excerpts from the trial record, and not reviewing petitioners submissions of a portion of the record (which they complain accurately was

not cited to pages and quotes, because, as petitioners put it, the testimony submitted was too persuasive in relevant factual information to make a breakdown practicable), and not accepting in the face of their limited visitation to the facts, the trial judges or the jury's findings, decided it only amounted to a mere defamation. The District Court believed that the facts supported a stigma plus situation because of the persuasive misconduct by the state action which was demonstrated at trial. Again, consistently based upon their lack of knowledge of the factual record, the Third Circuit rejected the District Courts opinion that facts sufficient to support a stigma plus finding were present. They saw no liberty interest, and they saw nothing beyond some minor defamation.

III

THE WRIT SHOULD BE GRANTED BECAUSE THERE IS A PROTECTABLE DUE PROCESS INTEREST IN FREE ENTERPRISE, IN STARTING UP AND CONDUCTING A BUSINESS, FREE OF INTENTIONAL GOVERNMENT INTERFERENCE.

The Third Circuit went far beyond merely commenting or holding that based upon their factual conclusion, the facts here only supported a mere defamation claim. Their opinion was based upon a definitive fear that agreeing with the District Court would result in a deluge of run of the mill state tort claims. This fear dominates their opinion and produces an anomalous result.

Their holding that "after all Boyanowski was never barred from having his bids considered "is simply incredulous. It appears out of thin air. It simply isn't accurate. If what the Boyanowski's suffered at the hands of the state actors, who enjoy incredible deference in our system today, from immunity protections of all sorts to the fear that the administration of

justice will be overburdened. This was a stigma plus case. Setting up and running a business, and the freedom to engage in that business free of a pervasive and fatal interference from competing government actors is a protectable, federally guaranteed, interest. The District Court's holding should be reinstated and the Third Circuit should be reversed.

IV

THE WRIT SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT APPLICABILITY OF THE DOCTRINE OF PREDICTABLY WAS ARBRITARY AND CAPRICIOUS APPLIED AND LACKS GUIDANCE FROM THIS COURT.

In deciding to dismiss the jury and reverse the District Court on Dorothy Boyanowski's civil conspiracy claim the Third Circuit promulgated a doctrine of "predictability" for determining what a state supreme court would find and relied on their interpretation of a Pennsylvania appellate court decision (not the state Supreme Court) concluding that such a decision was "datum" as per West v. American Telephone Co., 311 U.S. 223 (1940). With nothing else to go on the trial court was again set aside. there is still no definitive holding in Pennsylvania that a civil conspiracy cannot stand only as a separate offense without an underlying tort. It does in federal law, both criminally and civilly. This doctrine should be revisited and redefined by this Court.

V

THE PETITION SHOULD BE GRANTED BECAUSE PENNSYLVANIA RULE OF PROFESSIONAL CONDUCT 4.2 BASED UPON THE MODEL CODE, SHOULD BE STRUCK DOWN AS VOID AS AGAINST PUBLIC POLICY PARTICULARLY WHERE

GOVERNMENT OFFICIALS AND GOVERNMENT POLICY, ACTIVITY, AND FUNCTIONS ARE INVOLVED.

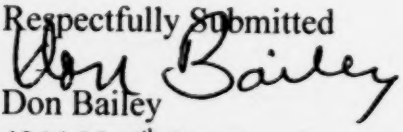
Perhaps this issue, totally ignored by the Third Circuit, is the most important addressed to this Court. See App.C. William Jacobi was in charge of administering the data processing facility at the respondent CAIU. He was not a policy or major decision maker. He had no voting or decision making powers beyond his small office function. But he knew a great deal about the underlying fact situation. After this litigation began he was known to stand on his own and would not conform to efforts to change information etc. When approached by respondents' counsel he informed him that he didn't agree with what was occurring, did not want his representation, and it was obvious that he intended to "spill the beans" in the interest of what he believed to be justice. He claims he was threatened, and that his superior George Zimmerman had already been threatened if he told the truth. He called petitioners' counsel and asked if he could speak to him.Counsel indicated he would listen, but if anything relevant to the litigation was discovered it would be passed on to respondents' counsel. Jacobi agreed and told some of his story. Petitioners' counsel called respondents' counsel and informed him. The District Court presumed that Jacobi was a manager, and that his testimony and availability to opposing counsel was limited by Rule 4.2. Jacobi's testimony would have been devastating to respondents. Why are public officials, and government defendants allowed to control, threaten and preclude other public employees (short of court employees, national security, or other necessitous limitations) from disclosing information about the official conduct and affairs of other public officials and employees. This is a rule in need of reform in the interest of a more sound public policy. Mr. Jacobi came forward voluntary without solicitation or encouragement of any kind. Why is opposing counsel forced by this rule to

reinforce the threats he had already received from his own counsel, who was forced on him by the respondents and direct him back to fear and discord?. This rule is an affiant to the administration of justice, serves to discourage the search for the truth, and should be void against public policy.

CONCLUSION

This case contains issues of national importance. How free are we to engage in free enterprise? What are the limits that government entities who already enjoy significant protections not afforded other torfeasors in our system, can go to destroy their opposition. Why do otherwise useful Rules (4.2) operate to suppress the truth, avoid justice, and result in bad government policy and practice, let alone support threats of firings and demotions visited on public employees. This Court should accept the writ.

Respectfully Submitted



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APPENDIX

APPENDIX "A" - MEMORANDUM OPINION IN THE THIRD CIRCUIT COURT OF APPEALS DATES JUNE 14, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD BOYANOWSKI, Individually; DONALD BOYANOWSKI, tdba, Boyo Transportation Services Inc.: DOROTHY BOYANOWSKI: BOYO TRANSPORTATION: SERVICES INC; MICHAEL: LABALOKIE	:	
	:	NOS. 98-7324 and 98-7349
v.	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN NAGLE; ED FRYE; ROGER MORRISON, Individually; MARK BAUER: WEST PERRY SCHOOL DISTRICT	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN NAGLE; ED FRYE; Appellants in 98-7324	:	
DONALD BOYANOWSKI; MICHAEL LABALOKIE	:	ARGUED SEPTEMBER 23, 1999
Appellants in 98-7349	:	

BEFORE: HONORABLE BECKER, Chief Judge
HONORABLE GARTH, Circuit Judge
HONORABLE POLLAK, District Judge

MEMORANDUM OPINION
BY CHIEF JUDGE BECKER

FILED:
June 14, 2000

OPINION OF THE COURT

BECKER, Chief Judge.

These appeals arise from a judgment entered in the District Court on separate jury verdicts in favor of a transportation contractor and his wife in their respective civil rights and civil conspiracy suits against a local government entity and its officials. Donald Boyanowski alleged that his efforts to furnish transportation services to school districts failed because of conduct by local officials that violated his substantive due process rights. Dorothy Boyanowski claimed to have been the victim of a civil conspiracy by two local officials that prevented her from receiving contracts to work as a bus driver. The appeal of the verdict in Donald Boyanowski's favor requires consideration of the relation, and separation, between federal constitutional and state tort actions. The appeal of the verdict in Dorothy Boyanowski's favor presents the question whether a plaintiff 's verdict for (state law) civil conspiracy can survive when the jury has found for the defendant on the underlying tort.

The first verdict, in favor of Donald Boyanowski and against his former employer, the Capital Area Intermediate

Unit ("CAIU"), was entered on his claim that the CAIU's conduct violated his substantive due process rights. He also won a verdict against John Nagle, who had been executive director of the CAIU, but the District Court set it aside on qualified immunity grounds. Mr. Boyanowski's claims are essentially state tort defamation claims that do not implicate a federal constitutional interest. Constitutional claims of this sort have been implicitly rejected by the Supreme Court, see Siegert v. Gilley, 500 U.S. 226 (1991), and find no basis in our jurisprudence. We will therefore set aside the jury verdict in Mr. Boyanowski's favor. In light of our conclusion that he has not been deprived of constitutionally protected rights, there is no need to consider his cross-appeal of the District Court's decision to grant Nagle qualified immunity.

The second verdict, in favor of Dorothy Boyanowski against two CAIU officials, is for civil conspiracy. She claimed that officers of the CAIU conspired to interfere with her contract rights as part of their campaign against her husband. The jury found in her favor on her civil conspiracy complaint while rejecting her claim for tortious interference with contract. In light of the jury's finding that the underlying tort did not occur, we conclude that the civil conspiracy claim can not survive. See GMH Assoc., Inc. v. Prudential Realty Group, CB, ___ A.2d ___, No. 198 EDA 1999, 2000 WL 228918 (Pa. Super. Ct. March 1, 2000); Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. Ct. 1987). We will therefore set aside the verdict on civil conspiracy as well, and remand with directions to enter judgment for the defendants on all counts.

The CAIU is a governmental entity operating under Pennsylvania's public school laws. Intermediate units ("IUs") are part of the state's public school system and operate service programs that are open to the local public school districts assigned to each intermediate unit. See Pa.

Stat. Ann. tit. 24 S 9-951 et seq. The board of directors of the IU is elected from the boards of directors of the component school districts. See id. S 9-960. The CAIU is one of twenty-nine IUs in the state. See id.S 9-952. The CAIU provides transportation for disabled children to and from classes and programs throughout the unit's region. It does so through a combination of employees and independent contractors. Prior to his retirement in July 1993, defendant John Nagle, as is noted above, was Executive Director of the CAIU. Defendant Edward Frye was the Assistant Executive Director and succeeded Nagle as Executive Director.

Until his retirement in March 1993, Donald Boyanowski was the CAIU transportation supervisor. After retiring, he established Boyo Transportation Services, Inc. ("Boyo"), which sought to contract for special transportation services with the member school districts of the CAIU. This entailed convincing them to no longer acquire such services through the CAIU. Mr. Boyanowski was therefore effectively competing with his former employer. Having been unsuccessful in persuading any member districts to accept his contract proposals, he brought suit under 42 U.S.C. S 1983, contending that his lack of success was the product of a violation of his substantive due process rights. At trial, he produced evidence that Nagle unfairly blamed him for rising costs of the CAIU program that occurred while he was a supervisor, and had referred to Mr. Boyanowski as a "crook" in a meeting of the CAIU superintendents council. Mr. Boyanowski alleged these actions were part of a concerted effort to keep him from obtaining any contracts.

The jury found that the CAIU's and Nagle's conduct violated Mr. Boyanowski's substantive due process rights, and awarded compensatory damages in the amount of $50,000 against the CAIU and $100,000 against Nagle. The jury also awarded $100,000 in punitive damages against

Nagle. On post-trial motions, the District Court ruled that Nagle was entitled to qualified immunity on the substantive due process claim, and it set aside the verdict and damages against him. The CAIU appeals the substantive due process judgment against it, and Mr. Boyanowski cross appeals the grant of qualified immunity to Nagle.

The jury also considered several claims brought by Dorothy Boyanowski. She had been employed as an independent contractor bus driver for the CAIU After her husband established Boyo, Ms. Boyanowski's contract was not renewed. She contended that Frye and Nagle engaged in conduct that amounted to tortious interference with contract against her as well as a civil conspiracy. She produced evidence at trial not only that her contract was not renewed, but also that Frye had made statements that were relayed to one of CAIU's busing contractors that hiring her would not be a "good idea," and that this communication occurred while Nagle was still in charge. Ms. Boyanowski also produced evidence that Nagle had sent her a letter informing her that her contract would not be renewed. The jury found for the defendants on the tortious interference with contract claim, but ruled in Ms. Boyanowski's favor as to the civil conspiracy, awarding her $50,000 against Nagle and $100,000 against Frye. The defendants also appeal this judgment.

The District Court had jurisdiction over Donald Boyanowski's civil rights claim under 28 U.S.C.S 1331, 1343. It had supplemental jurisdiction over Dorothy Boyanowski's state law claims pursuant to 28 U.S.C. S 1367. Our jurisdiction over the District Court's final order is based on 28 U.S.C. S 1291. Our review of all legal questions is plenary.

The core of due process is the protection against arbitrary governmental action and has procedural and

substantive components. See County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998). The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs, and covers government conduct in both legislative and executive capacities. See id. at 846. The CAIU's appeal requires us to address executive conduct alleged to have infringed upon Donald Boyanowski's rights as protected by the Due Process Clause of the Fourteenth Amendment.

Unfortunately for Mr. Boyanowski, his substantive due process claim is properly read as a state law defamation claim. This is even made clear by his own brief, which indicates that his S 1983 claim is based on defamation and exists solely to circumvent Pennsylvania sovereign immunity against state tort claims. As the Boyanowskis' brief recites:

> According to appellants, if a government entity is interested in doing business, and in the process uses its political power and muscle to systematically destroy the business opportunities of a competing private citizen through slur, innuendo, and outright false accusations, then the misconduct is simply not actionable. In Pennsylvania sovereign immunity protects government from tortious interference with contracts suits. Appellants know there is no adequate recourse under state defamation law also because of sovereign immunity statutes.

Appellee's Br. at 8 (emphasis added). Of course the lack availability of a state law remedy will not serve to elevate an ordinary tort to a constitutional violation. The degree to which Pennsylvania wishes to waive sovereign immunity claims for state causes of action is the quintessence of a state law question.

In instructing the jury on Mr. Boyanowski's substantive

due process claim, the District Court charged: You must first decide if each of plaintiffs were deprived of a fundamental right. You are advised that here is no constitutionally protected right to obtain future government contracts, and that suspension or debarment from bidding on government contracts may be a basis for liability only if it is based upon a charge of fraud or dishonesty. Plaintiffs must therefore show that the government officials stigmatized plaintiff by publishing charges of fraud or dishonesty which were substantially and materially false, and that the defendants making them knew they were false or had serious doubts about the truth of these statements, and that those statements had the effect of preventing plaintiff from engaging in the transportation business. Assuming arguendo that the jury's verdict for Mr. Boyanowski on this charge was supported by the evidence, we must determine if the substance of the charge was correct, i.e., whether defamatory statements that curtail a plaintiff 's business opportunities suffice to support a substantive due process claim. At the outset of this inquiry, we must be mindful of the Supreme Court's commands in addressing the interplay of constitutional and state tort law. First, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976). Second, we must remember that"[a]s a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Collins v. City of Harker Heights , 503 U.S. 115, 125

(1992) (citation omitted). Addressing the substantive due process claim, therefore, requires scrupulous attention to the guideposts that have previously been established. A

We note preliminarily that establishing a substantive due process claim even when executive action has infringed an interest protected by the Due Process Clause is difficult. "Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be `arbitrary in the constitutional sense. . . .' " County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Collins v. Harker Heights , 503 U.S. 115, 129 (1992)) (emphasis added). For executive conduct, the Supreme Court has "for half a century now . .. spoken of the cognizable level of executive abuse of power as that which shocks the conscience." See id. Determining whether the challenged action rises to this level has been described as a "threshold" question in a challenge to an executive action. See id. at 847 n.8 ("[The] threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. . . . Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action . . . .").

Though we construe the trial record in Mr. Boyanowski's favor, we cannot agree that the conduct of which he complains rises to the level required by the Supreme Court in Lewis. The statements allegedly made about Donald Boyanowski--that he was a "crook" and was responsible for cost overruns of the CAIU's transportation program--had no direct legal effect upon him. He was not prohibited from bidding on contracts or otherwise restricted in his conduct, and the comments were not publicized in a manner that

would humiliate him before the community at large. At least one of our sister circuits has found that far more defamatory statements did not rise to a conscience-shocking level for substantive due process purposes. See Mertik v. Blalock, 983 F.2d 1353, 1367-68 (6th Cir. 1993) (affirming district court conclusion that banning coach from city ice rink and publishing to third parties false statements that coach was sexually abusing minor students did not rise to conduct that shocked the court's conscience). The evidence in this case does not rise to the level of truly egregious conduct that is required for a substantive due process claim as described by the Supreme Court in Lewis. At worst, the evidence indicates sharp business practices by a competitor.

It is true that Lewis teaches that what"shocks the conscience" varies from circumstance to circumstance. See Lewis, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."). We need not, however, definitively calibrate the egregiousness level that Lewis would require of a defamation-type claim because other precedent makes clear that this sort of claim cannot present a substantive due process violation in the first place

The Supreme Court has made clear that federal courts are not to view defamatory acts as constitutional violations. In Paul v. Davis, 424.U.S. 693 (1976), a procedural due process case, the Court held that defamation by itself did not harm a "liberty" interest protected under the Fourteenth Amendment. Paul involved a plaintiff whose name and photograph appeared on a police flyer that was captioned "Active Shoplifters" and distributed among

merchants. The Court turned aside a procedural due process claim on the grounds that harm to reputation alone did not suffice for a constitutional tort based on procedural due process. See id. at 711-12. Although the claim was based in procedural due process, the Court's holding was that the interest in reputation was neither "liberty" nor "property" that was protected by the Due Process Clause. See id. at 712.

Even more relevant to the case at hand is the Court's return to the issue in Siegert v. Gilley, 500 U.S. 226 (1991). In Siegert, the plaintiff was a clinical psychologist who had been employed by a federally operated hospital in Washington, D.C. He resigned his post, rather than face termination, and found another position at a U.S. Army hospital in West Germany. That position required "credentialing," the securing of which required plaintiff to ask his former employer to provide information to the Army facility. In response to the request, his former supervisor wrote a letter that labeled plaintiff as inept, unethical, and untrustworthy. Plaintiff was subsequently denied the necessary credentials and ultimately lost his position. He then brought a Bivens action against his former supervisor. See id. at 228-29. The Supreme Court rejected the claim.

Though the Court acknowledged that defamation injuries do indeed lead to monetary losses that flow from the injury to reputation, it stated that "so long as such damage flows from injury caused by the defendant to a plaintiff 's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action." Id. at 234. "The statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects. But the plaintiff in Paul v. Davis similarly alleged serious impairment of his future employment opportunities as well as other harm." Id. The

Court therefore concluded that Siegert failed to allege a constitutional deprivation. See id. at 233-34. Donald Boyanowski also alleged that harm flowed from the statements made about him insofar as he was unable to receive any of the contracts for which he bid. We do not see how his harm was of a different nature from that alleged in Siegert. Both plaintiffs alleged harm flowing from defamatory statements made by former employers. It is therefore hard to see how Siegert is not fatal to the substantive due process claim.1 Even if Siegert is construed strictly as a procedural due process case, it does not support the claim because Siegert declares that the claim of harm flowing from the defamatory statement is not a liberty interest protected by the Due Process Clause. Cf. Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989) ("[I]n this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of

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1. The similarity of harms in the two cases also would appear to doom any effort to link the "stigma plus" analysis that has characterized procedural due process cases that have arisen in wake of Paul v. Davis and concern defamatory statements, see, e.g., Ersek v. Township of Springfield, 102 F.3d 79, 83 n.5 (3d Cir. 1996), with the substantive due process claim urged by Mr. Boyanowski. Even if we were to entertain such an application, our precedents are decidedly against such claims.
See, e.g., Kelly v. Borough of Sayreville, 107 F.3d 1073, 1078 (3d Cir.1997) ("[E]ven financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest."); Sturm v. Clark, 835 F.2d 1009, 1012-13 (3d Cir. 1987) ("Most,if not all, charges of defamation are inevitably accompanied by financial loss.").

Substantive due process."); In re Selcraig , 705 F.2d 789,796 (5th Cir. 1983) (rejecting substantive due process claim arising from stigmatization of discharged employee but discussing potential availability of procedural name-clearing hearing). Indeed, it would be an odd result to hold that the CAIU was free to stigmatize Mr. Boyanowski without providing him with procedural protections from the statements, but was not free to make the statements without - incurring liability under the Constitution. Upholding the substantive due process claim, therefore, would not be supported by Supreme Court precedent. Neither does Mr. Boyanowski's claim find refuge in those Third Circuit cases that have upheld substantive due process claims. We have recognized substantive due process claims in certain limited circumstances when the existence of procedural due process protections is not at issue. See, e.g., Independent Enters., Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1179 (3d Cir. 1997). We have never, however, suggested that a substantive due process cause of action lies for the kind of claim pursued in the District Court.

Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority is perhaps the most analogous precedent. The facts in that case presented a stronger basis for a substantive due process claim than do those in the case at hand because there was evidence of direct interference by executive actors with the procurement of contracts. The plaintiff was a contractor who had entered into a consent decree with a city water and sewer authority. That decree precluded the contractor's being barred based on past performance from bidding on city contracts. In subsequent bids, the contractor was the low bidder on two contracts and received neither. In one case, the contracting authority was ordered to halt awarding contracts to the contractor because of a cost overrun in a recent project. These actions

appeared to violate the consent decree, which provided that the contractor could not be "disqualified" based on post-decree performance absent a hearing under local law. See id. at 1168-69.In ruling whether those facts could be used to state a substantive due process claim, we summarized our substantive due process jurisprudence as follows:

> Although the Third Circuit has recognized that a governmental deprivation that comports with procedural due process may still give rise to a substantive due process claim "upon allegations that the government deliberately and arbitrarily abused its power," we have also held that a substantive due process claim grounded in an arbitrary exercise of governmental authority may be maintained only where the plaintiff has been deprived of a "particular quality of property interest." Although our court has suggested that only fundamental property interests are worthy of substantive due process protection, it has provided little additional guidance regarding what specific property interests should receive substantive due process protection.

Id. at 1179 (citations omitted).

Though it ultimately "le[ft] for another day definition of the precise contours of the `particular quality of property interest' entitled to substantive due process protection," id. at 1180, the Independent Enterprises panel observed that the infringed interest must be a concrete one:

> We have held that "ownership is a property interest worthy of substantive due process protection,"
> [DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell, 53 F.3d 592, 600 (3d Cir. 1995)], but we have found that neither interest in prompt receipt of payment for professional services provided to the state, Reich, 883 F.2d at 244-45, nor state law entitlement to water and sewer services, Ransom v.

Marrazzo, 848 F.2d 398, 411-12 (3d Cir. 1988), are the "certain quality" of property interest worthy of substantive due process protection. We have also strongly suggested in dictum that a student's right to continued enrollment in a graduate program does not rise to such a level on the ground that such an interest bears " `little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution.' " Mauriello v. Univ. of Med. & Dentistry of N.J., 781 F.2d 46, 50 (3d Cir. 1986) (quoting Regents of Univ. of Michigan v. Ewing , 474 U.S. 214, 229-30, 106 S.Ct. 507, 516, 88 L.Ed.2d 523 Powell, J., concurring)).

Id. at 1180 (quoting Homar v. Gilbert , 89 F.3d 1009, 1021 (3d Cir. 1996), rev'd on other grounds, 520 U.S. 924 (1997)).

Applying this precedent, we ruled that the facts in Independent Enterprises did not give rise to a viable substantive due process claim, observing that we had"no difficulty" in concluding that the alleged interest was not the sort of fundamental interest protected by substantive due process. See id. We view the facts in Independent Enterprises, where defendants actively prevented plaintiffs from winning contracts in violation of a consent decree, as constituting a more compelling claim that a protected interest had been violated than that proffered by Donald Boyanowski, who was never barred from having his bids considered. There is no basis in our substantive due process precedent for according him the relief that he seeks.

C.

The District Court's jury instruction characterized the issue at stake as Donald Boyanowski's liberty interest to engage in the transportation business. In its denial of CAIU's post-trial motion, the District Court defended this characterization by referring to Meyer v. Nebraska, 262 U.S. 390 (1923). The District Court described Donald Boyanowski's defamation-based damages as "derived from a fundamental liberty interest to engage in the common occupations of life protected by the Fourteenth Amendment." Op. at 10 (citing Meyer, 262 U.S. 390, 399 (1923)).

As discussed above, our precedent has never read substantive due process as extending as far as did the District Court. Contrary to that court, we do not view Meyer as helpful to the substantive due process claim before us. Meyer involved a prosecution of a teacher who violated a statutory bar on the teaching of a foreign language. In reversing the conviction on due process grounds, the Supreme Court uttered the broad and celebrated language about the right to engage in any of the common occupations of life, on which the District Court's opinion relies. See Meyer, 262 U.S. at 399. The case turned, however, on a direct bar to the teacher's teaching, as well as the concurrent interference in parental rights over children. See id. at 400. The more analogous situation for Mr. Boyanowski, if Meyer were relevant, would have involved a prosecution targeting him for the mere act of bidding on transportation contracts. His actual situation was too remote from the facts of Meyer for that case to have particular applicability.

The Supreme Court has already held that Meyer may not be read to constitutionalize all executive actions that affect the pursuit of a profession in any way. See Conn v. Gabbert, 119 S. Ct. 1292 (1999). In Conn, the Court

rejected an attorney's attempt to claim that a search-warrant executed upon him while his client was testifying before a grand jury violated the attorney's Fourteenth Amendment right to practice his profession. In so doing, the Court focused on the language of Meyer on which the District Court relies here, but specifically rejected its application to the plaintiff 's circumstances. See id. at 1295. We similarly view Meyer as too slender a reed on which to rest Mr. Boyanowski's substantive due process claim.

Moreover, the approach taken by the District Court would subsume broad categories of tort law under the constitutional aegis. Equating a defamatory statement that leads to a third party's not extending a contract to a frustrated plaintiff with the deprivation of the plaintiff 's legal right to engage in the common occupations of life in a manner protected by the Fourteenth Amendment goes too far. It is true that such an action has some effect on an individual's ability to navigate the often treacherous waters of government contracting, but to leap to the broad level of generality necessary to classify the harm in substantive due process terms would constitutionalize broad swaths of state tort law.

If Donald Boyanowski's claim can survive, the same could be said for any number of mundane state tort cases that lack a clear constitutional basis. In addition to implicitly overruling the Supreme Court's holding in Siegert, upholding the verdict would ignore the Supreme Court's twin commands that the Fourteenth Amendment not become a font of tort law that supplants state systems, see Paul, 424 U.S. at 701, and that the cause of action encompassed by substantive due process not be expanded without extreme care, see Collins, 503 U.S. at 125.

Because Donald Boyanowski's claim, the record evidence, and the District Court's jury instruction all point to a state law defamation claim and not a constitutional substantive

due process claim, we will reverse the judgment entered on the jury verdict in favor of Mr. Boyanowski on his substantive due process claim against the CAIU. Our ruling in this regard moots his cross-appeal as to the District Court's grant of qualified immunity to Nagle.

III.

We turn to Dorothy Boyanowski's jury verdict for civil conspiracy against Frye and Nagle. The defendants offer an array of arguments in support of our setting aside the verdict. First, they submit that the jury's verdict in their favor as to the underlying tort of tortious interference with contract requires dismissal of the civil conspiracy verdict. Second, they contend that the defense verdict on the tort claim vitiates any award of damages on the conspiracy claim. Third, the defendants argue that they had no legal capacity to conspire; they submit that because under Pennsylvania precedent a corporation cannot conspire with itself, Dorothy Boyanowski had to prove that Frye or Nagle was acting outside the scope of his duty for personal reasons. Fourth, the defendants claim that there was no evidence of a concerted action or common scheme necessary to sustain a conspiracy finding. Fifth, the defendants assert that no evidence was presented indicating that Frye and Nagle willfully engaged in unlawful conduct, and that such evidence is a prerequisite for the removal of their statutory immunity under Pennsylvania law. Furthermore, the defendants submit that Frye and Nagle should have been given absolute immunity as"high public officials." Finally, the defendants claim that there was insufficient evidence to support the jury's verdict against them on the claim of civil conspiracy. Many of these assignments of error pertain to the sufficiency of the evidence presented by Ms. Boyanowski at

trial. Unfortunately, rather than provide any citations to the record in their brief on appeal, which consisted mostly of assertions that were unsupported by citation, legal or otherwise, the Boyanowskis' counsel elected simply to submit several volumes of trial transcript, refer to the trial record as a whole, and unhelpfully tell this Court that "only a review of the entire record can totally illuminate the entire picture heard by the jury." Appellees' Br. at 14. At oral argument the panel afforded counsel a second opportunity to point to specific instances in the record that supported the jury's findings in this matter. Although the evidence in the record finally cited by the Boyanowskis' lawyer is exceedingly thin, possibly to the point of justifying reversal on insufficiency grounds alone, we need not consider the weight of the evidence presented at trial because the issue can ultimately be disposed of on the defendants' first assignment of error.

In their brief, the defendants point to Pennsylvania precedent that holds that a claim of civil conspiracy cannot be pled without also alleging an underlying tort. See, e.g., Nix. v. Temple Univ., 596 A.2d 1132, 1137 (Pa. Super. Ct. 1991); Pelagatti v. Cohen, 536 A.2d 1337, 1342 (Pa. Super. Ct. 1987). They fail, however, to cite authority for the proposition that once an underlying tort has been alleged, only a finding that the underlying tort has occurred will allow an appellate court to sustain a similar finding on the civil conspiracy charge. The rule that civil conspiracy may not exist without an underlying tort is a common one. See In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 & n.7 (3d Cir. 1999) (collecting cases). Indeed, "we are unaware of any jurisdiction that recognizes civil conspiracy as a cause of action requiring no separate tortious conduct." Id. at 789. It is not surprising that there are few cases dealing with the sort of mixed verdict we have

here, as a jury would not logically be expected to determine that civil conspiracy occurred, but that the underlying tort did not. Candidates for such verdicts would usually be screened out at the summary judgment or pleading stage, and that is indeed where most precedents that state the underlying tort rule are to be found. We must therefore predict whether the Pennsylvania Supreme Court would apply a rule that is normally employed at the pleading stage to overturn a jury verdict for civil conspiracy in a plaintiff 's favor. We predict that it would. In predicting how a matter would be decided under state law we examine: (1) what the Pennsylvania Supreme Court has said in related areas; (2) the decisional law of the Pennsylvania intermediate courts; (3) federal appeals and district court cases interpreting the state law; and (4) decisions from other jurisdictions that have discussed the issues we face here. See Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 459-60 (3d Cir. 1993). While we lack a clear statement from the Pennsylvania Supreme Court on the precise question at issue, a panel of the Pennsylvania Superior Court recently decided a case that would decisively resolve the issue if we follow the resulting precedent. See GMH Assoc., Inc. v. Prudential Realty Group, CB, ___ A.2d ___, No. 198 EDA 1999, 2000 WL 228918 (Pa. Super. Ct. March 1, 2000). GMH arose out of a failed real estate transaction. The trial court, sitting without a jury, found defendants liable to plaintiffs for breach of contract, breach of duty to negotiate in good faith, promissory estoppel, fraudulent misrepresentation, fraudulent non-disclosure, and civil conspiracy. See id. at *5. On appeal, the Pennsylvania Superior Court concluded that no fraud had actually occurred. See id. at *10. The claim of fraud was the underpinning for the civil conspiracy claim. See id. at *13. Because the fraud claim was set aside, the court held that

the civil conspiracy claim could not survive: [Plaintiffs'] conspiracy claims were based on the allegation that all defendants conspired to defraud [plaintiff]. Because we conclude that no fraud was committed, we correspondingly find that no civil conspiracy to defraud occurred. See generally [Rutherford v. Presbyterian-Univ. Hosp., 612 A.2d 500, 508 (Pa. Super. 1992)] (citing Rose v. Wissinger, 294 Pa. Super. 265, 439 A.2d 1193 (1982) (where complaint fails to set forth claim for defamation or outrageous conduct causing emotional distress, there could be no conspiracy to commit those acts); and Raneri v. DePolo, 65 Pa.Cmwlth. 183, 441 A.2d 1373, 1376 (Pa.Cmwlth. 1982) (under Pennsylvania law, when a party fails "to sufficiently allege in[other] counts any unlawful act or unlawful means" the conspiracy claim must also fail when it is based on these claims)).

Id.

As the quoted passage makes clear, the court did not dismiss the conspiracy claims based on an independent evaluation of their viability in light of the record developed by the trial court. Rather, the failure of the underlying fraud claim sufficed as a matter of law to vitiate the finding of civil conspiracy notwithstanding the fact that it had been successfully pled as an independent cause of action.

An intermediate appellate state court's decision"is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." West v. American Telephone & Tel. Co., 311 U.S. 223, 237 (1940). We not only conclude that GMH is persuasive on its logic, but rather than finding sufficient contrary persuasive data, we find other factors

that counsel that we follow the GMH court.

The precept employed by GMH is logically sound. It is sensible that the rule requiring the existence of an underlying tort in the pleading stage similarly requires that the tort be proven if a civil conspiracy claim is to prevail. To be sure, there are arguments to the contrary. One could argue the reverse inference and maintain that the jury's finding that there was a civil conspiracy against Dorothy Boyanowski that caused damage means that the jury's ruling for the defendants in the tortious interference of contract claim was actually the legally incorrect one. Another argument is that the two causes of action, whatever their linkage in the pleading stage, are distinct. Inconsistent jury verdicts are an unfortunate fact of life in law, and should not, in and of themselves, be used to overturn otherwise valid verdicts. Cf. Mosley v. Wilson, 102 F.3d 85, 90-91 (3d Cir. 1996) (ruling that district court erred as a matter of law when it directed judgment notwithstanding the jury's verdict on one claim on the sole ground that it was inconsistent with the jury's verdict on another claim).

We nonetheless believe that the defendants' reading is the better one in light of the nature of civil conspiracy. "Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort." Halberstam v. Welch, 705 F.2d 472, 479 (D.C. Cir. 1983). A verdict on civil conspiracy should yield to a finding for the defendant on the underlying tort because the cause of action is wholly subordinate to the underlying tort's existence. We also are supported by the fact that courts in other jurisdictions have made similar holdings to that in GMH when faced with similar circumstances. See K&S Partnership v. Continental Bank, N.A., 952 F.2d 971, 980

(8th Cir. 1991); see also Akins v. Zeneca, Inc. , 62 F.3d 1417, 1995 WL 452087, (6th Cir. July 27, 1995) (affirming district court's dismissal of civil conspiracy claim after close of plaintiff 's evidence because of failure to prove underlying tort).

In light of the clear statement by the Pennsylvania Superior Court, practice in other jurisdictions, and what we perceive as the logical rule, we predict that if faced with this matter, the Pennsylvania Supreme Court would reverse Dorothy Boyanowski's judgment for civil conspiracy. We therefore need not reach the defendants' other arguments for reversing the verdict.

The judgment of the District Court will be reversed, with direction to enter judgment in favor of the defendants on all counts.

A True Copy: Teste

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX "B" MEMORANDUM AND ORDER OF THE DISTRICT COURT DATED APRIL 27 , 1998

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD E. BOYANOWSKI: individually; BOYO TRANSPORTATION SERVICES INC., DOROTHY: A. BOYANOWSKI; and MICHAEL P. LABALOKIE	:	**CIVIL NO.1:CV-94-1252**
Plaintiffs	:	
v.	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN E. NAGLE; ED FRYE; ROGER MORRISON; MARK BAUER; and THE WEST PERRY SCHOOL DISTRICT	:	
Defendants	:	

MEMORANDUM

Before the court are motions for judgement as a matter of law and for a new trial, filed by Defendants Capital Area Intermediate Unit, John E. Nagle and Edward T Frye (collectively, "Defendants"). The motions have been briefed

and are ripe for disposition.

1. Background

A brief background of the parties and claims is as follows: Plaintiff Donald Boyanowski worked as a Transportation Supervisor for Capital Area Intermediate Unit ("CAIU") for over twenty years. When he retired from CAIU, he established Boyo Transportation Services, Inc ("Boyo") to compete with CAIU for contracts with school districts to provide transportation for special education students. Plaintiff Dorothy Boyanowski also worked for CAIU and her contract was not renewed when her husband Donald set up Boyo. Plaintiff Michael Labalokie was another driver for CAIU. Defendant John E Nagle was CAIU's executive director until July 1993, and Defendant Ed Frye succeeded Nagle as executive director. Prior to July 1993, Frye was CAIU's assistant executive director. Boyo's attempt to garner transportation contracts from school districts was unsuccessful.

Plaintiff's filed the instant action, alleging several federal and state claims against Defendants. The court disposed of several of Plaintiff's claims through pretrial motions. On June 23, 1997, a jury trial commenced on the remaining claims in the case. The claims were as follows: (1) substantive due process claims of Donald Boyanowski, Dorothy Boyanowski and Boyo against CAIU, Nagle and Frye; (2) a tortious interference with contract claim of Dorothy Boyanowski against CAIU, Nagle and Frye; (3) a tortious interference with contract claim of Michael Labalokie against Nagle; (4) civil conspiracy claims of Donald Boyanowski, Dorothy Boyanowski and Boyo against CAIU, Nagle and Frye; and (5) a First Amendment retaliation claim of Labalokie against CAIU. See June 2, 1997 Order. During the trial, the court partially granted Defendants' motion for judgment as a matter of law, further limiting the claims submitted to the jury.

Originally, three separate actions were filed. The court consolidated the actions prior to trial.

These claims included conspiracy claims.

At the conclusion of the trial, the jury found in favor of Defendants on all of Labalokie and Boyo's claims. The jury found that CAIU and Nagle violated Donald Boyanowski's substantive due process rights and awarded damages against CAIU in the amount of $50,000, compensatory damages against Nagle in the amount of $100,000 and punitive damages against Nagle in the amount of $100,000. The jury found that Nagle and Frye conspired to tortuously interfere with Dorothy Boyanowski's contract. They awarded damages against Nagle in the amount of $50,000 and against Frye in the amount of $100,000. Nagle and Frye were found not to be liable on Dorothy Boyanowski's tortious interference contract claim.

Defendants seek renewed judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) and a new trial pursuant to Federal rule of Civil Procedure 59. In their Rule 50 (b) motion, Defendants argue for judgment as a matter of law on Donald Boyanowski's substantive due process claim and Dorothy Boyanowski's civil conspiracy claim and assert that the damages are excessive , speculative and without basis in law or evidence. In their motion for a new trial, Defendants argue that: (1) the jury verdict went against the weight of the evidence; (2) there were prejudicial evidentiary errors at trial, (3) there were defects in the jury instructions; and (4) the damages were excessive, speculative and without basis in law or evidence.

II Standard of Review

In deciding a renewed motion for judgment as a matter of law pursuant to Rule 50(b), the court follows the same standards as it did for the

In their reply brief, Defendants appear to argue that the statute of limitations has expired on the substantive due process claim. (Defs.' Reply Br. At 8.) The court will not address this argument, as parties may not raise new issues in a reply brief. See Sistrunk v. Vaughn, 96 F.3d 666, 671 n.4 (3d Cir. 1996); Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995), cert. denied, _____ U.S. _____, 116 S. Ct. 724 (1996).

original motion for judgment as a matter of law under Rule 50(a). See Geldermann, Inc. v. Advanced Mgmt. Consultants, Inc., 27 F.3d 307, 310 n.4 (7th Cir. 1994). The Third Circuit has articulated the standard for deciding a motion for judgment as a matter of law.

> Such motion should be granted only if, viewing the evidence in the light most favorable to the non-movant and, giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonable find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the Facts for the jury's version.

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

The authority to grant a new trial rests in the discretion of the court. Allied Chem. Corp. v Daiflon, Inc., 449 U.S. 33, 36 (1980) (per curium). The standard of review depends on the reasons a litigant requests a new trial. In the instant case, Defendants propound several arguments as to why the court should grant a new trial. The court will discuss the each of the

appropriate standards along with the Defendant's arguments in Section III (B).

III Legal Analysis

At the outset, the court notes that Defendants do not cite the trial record, nor have they submitted a transcript for the court's review. Without a transcript and with Plaintiffs and Defendants representing disparate versions of the trial testimony, the court is unable to judge Defendants arguments relating to the sufficiency of the evidence. Therefore, to the extent that Defendants' arguments rest on a lack of sufficiency of the evidence, the court will deny the motion. See Lightning Lube, 4 F.3d at 1166 (stating that, for judgment as a matter of law motion, court views evidence in light most favorable to non moving party); Anderson v. Radisson Hotel Corp., 834 F.Supp. 1364, 1369 n.3 (S.D. Ga. 1993) (stating that it is the movant's responsibility to search record and identify those portions which support its argument). The court has a transcript of the jury instructions, and, therefore, will be able to assess Defendants' jury instruction argument. The court will also address Defendants' arguments that pertain to purely legal issues, as a transcript is not necessary for decision on those matters.

A. Renewed Motion for Judgment as a Matter of Law

The court will first address Defendants' arguments for judgment as a matter of law on Donald Boyanowski's substantive due process claim. It will then address Defendants' arguments as they pertain to Dorothy Boyanowski's civil conspiracy claim. Finally, it will address Defendants' argument regarding the jury verdict.

Defendants assert that they "generally dispute that the trial testimony may be reasonable characterized as set forth in Plaintiff's brief...which is contrary to Defendant's recollections of the trial testimony." (Defs.' Reply Br. At 4.) Such an assertion is insufficient to carry their burden on the motions.

1. Substantive Due Process

Defendants assert several reasons why they should receive judgment as a matter of law on Donald Boyanowski's substantive due process claim. Defendants' legal arguments on this issue are: (1) Plaintiffs failed to state a cognizable substantive due process claim; (2) Nagle is entitled to qualified immunity; and (3) there should be no CAIU liability on this claim.

Defendants contend that Donald Boyanowski's claim was one of a failure to obtain future contracts with school districts based on defamation by Defendants and that such an assertion does not rise to a substantive due process claim. A person's substantive due process rights are violated by "irrational government action, or government action that is motivated by bias, some improper purpose, or bad faith." Ersek v Township of Springfield, 102 F.3d 79, 83 n.4 (3d Cir. 1996). Historically, courts have recognized the right to due process to protect individuals from the arbitrary exercise of government power. See Daniels v Williams, 474 U.S. 327, 331 (1986). A precondition of bringing a substantive due process claim, however, is a deprivation of a liberty of property interest. See id.

The court determined that Plaintiffs stated a cognizable liberty interest and pled sufficient facts to demonstrate a substantive due process violation with respect to that liability interest. See April 25, 1995 Memorandum and Order. The Supreme Court case of Board of Regents v Roth, 408 U.S. 564

(1972), is the starting point for the analysis. In Roth, the Supreme Court stated:

Defendants assert this argument as one of mixed fact and law. They argue that Donald Boyanowski has not demonstrated a substantive due process claim, factually or legally. Since Defendants do not cite to the record to support its argument, court will address the legal arguments only.

> While this court has not attempted to define with exactness the liberty... Guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of te common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men.

Id. At 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The Court concluded that a non-tenured professor who did not have his contract renewed had an insufficient interest to state a due process claim. The Court held, however, that certain circumstances relating to government employment implicate due process protections. It stated when a government employer bases the non-renewal of a contract on charges that the employee is "guilty of dishonesty or immorality" or impinges

upon the employee's "good name, reputation, honor or integrity," then the employee must receive notice and an opportunity to be heard. Id. At 573. The Court went on to state that barring a government employee from other public employment would implicate due process protections, "for [t]o be deprived not only of present government employment but of future opportunity for it is certainly no small injury." Id. At 574 (quoting Joint Anti-Facist Refugee Comm. V. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J. concurring)).

Damage to reputation alone is not a deprivation of a liberty or property interest protected by the due process clause. See Siegert v. Gilley, 500 U.S. 226, 234 (1991); Paul v. Davis, 424 U.S. 693, 708-09 (1976). In order to assert a due process claim under this line of reasoning, a litigant must demonstrate reputational damage plus an extinguishment or alteration of a right. See Sturm v. Clark, 835 F.2d 1009, 1013 (3d Cir. 1987). For example, a liberty interest is implicated when a suspension or debarment from bidding on government contracts is based upon charges of fraud or dishonesty. See Labalokie v. Capital Area Intermediate Unit, 926 F. Supp. 503, 508 (M.D. Pa. 1996) This concept has been articulated by several circuit courts. See Bank of Jackson County v Cherry, 980 F.2d 1354, 1357-58 (11th Cir. 1992); Sutton v. United States Dep't of Housing and Urban Dev., 885 F.2d 471, 475 (8th Cir. 1989); Atl, Inc v United States, 736 F.2d 677, 683 (Fed. Cir. 1984) Transco Security, Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 962-63 (D.C. Cir. 1980). As such, the court determined that Donald Boyanowski sufficiently stated a liberty interest.

In addition to an interest in the government contracts area, the Third Circuit has articulated a protected interest, to a certain extent, in future employment. See Robb v. City of Philadelphia, 733 F.2d 286, 294 (3d Cir. 1984) (An employment action implicates a fourteenth amendment

liberty interest only if it (1) is bases on a charge against [the individual that might seriously damage his standing and associations in the community...for example that he had been guilty of dishonesty, or immorality' or (2) impose[s] on him a stigma of other disability that forecloses his freedom to take advantage of other employment opportunities. Stigma to

(Continued)

While courts have held that litigants have due process rights in bidding for government contracts without stigma, the application has occurred in the context of procedural due process. See id. Not every interest worthy of procedural due process protection is afforded substantive due process protection. See Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989). Only federally protected rights are afforded substantive due process protection. See Ranson v. Marrazzo, 848 F.2d 398, 411 (3d Cir. 1988). Moreover, the interest must be a fundamental interest protected by the Constitution. See Independent Enterprises v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1180 (3d Cir. 1997). In the substantive due process context, the Third Circuit has stated that ownership is a property interest worthy of a substantive due process protection. See DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 600 (3d Cir. 1995). It has also indicated that First Amendment freedom of expression is an interest worthy of substantive due process protection. See Neiderhiser v. Borough of Berwick, 840 F.2d 213, 217-18 (3d Cir. 1988). The Third Circuit has stated that expectations of payment of attorneys' fees from the state, see Reich, 883 F.2d at 244-45 and receipt of utility service, see Ransom, 848 F.2d at 411-

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reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment.") (internal citations omitted). This protection is not unlimited, however, as the Third Circuit has clarified that, "[t}he possible loss of future employment opportunities is patently insufficient to satisfy the requirements

imposed by Paul that a liberty interest requires more than a mere injury to reputation." Clark v. Township of Falls, 890 F.2d 611, 620 (3d Cir. 1989). Since the court based its decision that Donald Boyanowski stated a liberty interest on government contracts, rather than future employment opportunity, the court need not determine whether his future employment opportunities were sufficient to state a liberty interest.

12, are insufficient to state a protected interest for substantive due process purposes. The Third Circuit also expressed doubt that enrollment in a graduate program is an appropriate interest to be afforded substantive due process protection. See Mauriello v. University of Medicine and Dentistry, 781 F.2d 46, 52 (3d Cir. 1986).

The Third Circuit stated that a substantive due process claim may lie only where a plaintiff has been "deprived of a particular quality of property interest." DeBlasio, 53 F.3d at 600. The court does not read this statement to foreclose actions where a plaintiff brings a claim involving a liberty interest, as the Supreme Court has recognized that fundamental liberty interests are also worthy of substantive due process protection. See Moore v. City of East Cleveland, Ohio, 431 U.S. 494 503 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973); Meyer, 262 U.S. at 399-400. In the instant case, Donald Boyanowski's liberty interest derived from the fundamental liberty interest to engage in the common occupations of life protected by the Fourteenth Amendment. See Meyer, 262 U.S. at 399. Since the interest was a fundamental one, deriving from the Constitution, Donald Boyanowski has stated a claim for substantive due process. The court will deny Defendants' motion to the extent that it argues that Donald Boyanowski did not assert a cognizable substantive due process claim.

The court rejects Defendants' additional arguments why, apart from the prima facie elements of a substantive due process claim, the jury verdict should not stand. Defendants argue that common law privilege concepts should apply to the substantive due process claim, which would shield Defendants

from liability. The court rejects this argument for the reasons set forth in Section III(B)(3), infra. Defendants further argue that the verdict in favor of Defendants on Boyo's substantive due process claim demonstrates that Donald Boyanowski did not receive any tangible injuries and that his only injuries could have been reputational, which would be insufficient to support a due process claim. The jury considered the claims of each Plaintiff separately and concluded that Donald Boyanowski's claim rose to the level of a substantive due process deprivation, while Boyo's did not. The court will not overturn the jury's careful consideration of the separate claims, nor second guess its reasoning, based on Defendants' supposition that there could be no tangible loss to Donald Boyanowski, individually.

The court concluded that Donald Boyanowski and Boyo raised cognizable substantive due process claims and allowed the claims to go to the jury. Defendants argue that the claims should not have gone to the jury for Defendant Nagle because he was entitled to qualified immunity.

Defendants argue that their statements are protected under the First Amendment and that there is no liability unless the statements were made with knowing falsity or reckless disregard to the truth or falsity of the statements. The court need not address the merits of this argument, as Plaintiffs contend that the record demonstrates knowing falsity. Thus, even if First Amendment protection is applicable, Plaintiffs contend that, under the facts of the case, Defendants have lost the protection. In the absence of a transcript and viewing the evidence in the light most favorable to Plaintiffs, the court will not grant Defendants' motion on this argument.

Qualified immunity protects an official from liability as long as his "conduct does not violate clearly established statutory rights or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants argue that Nagle is entitled to qualified immunity because no clearly established law has been violated. Specifically, they argue that "the law has been unclear

that a `stigma plus' theory may form the basis for a substantive due process claim or that reputational interests are otherwise accorded substantive due process protection." (Defs.' Br. at 10.)

The parameters of an interest sufficient to implicate a protected interest for a substantive due process claim have not been clear. Third Circuit precedent discusses substantive due process in the context of property interests, rather than liberty interests, and has stated as recently as 1997 that it "will leave for another day definition of the precise contours of the `particular quality of property interest' entitled to substantive due process protection." Independent Enterprises, 103 F.3d at 1180. The Third Circuit also has recognized that in a "stigma plus" case, such as the one here, "what satisfies that `plus,'...is uncertain." Ersek v. Township of Springfield, 102 F.3d 79, 83 n.5 (3d Cir. 1996). Additionally, the "stigma plus" liberty interest has been generally applied to the context of procedural due process, rather than substantive due process. Another court within our Circuit has come to the opposite conclusion from this court – that the liberty interest implicated by Roth extends only to procedural due process and not substantive due process. See Austin v. Neal, 933 F. Supp. 444, 455-56 (E.D. Pa. 1996) (citing In re Selcraig, 705 F.2d 789, 796-97 (5th Cir. (1983)). Since the liberty interest in this case falls within the scope of interests not directly addressed by the Third Circuit, and the courts are divided on the viability of a substantive due process "stigma plus" claim, the court finds that the right is not clearly established for qualified immunity purposes. Therefore, the court will grant Nagle qualified immunity on the substantive due process claims.

Defendants also argue that CAIU should not be held liable for a violation of Donald Boyanowski's substantive due process rights. Without a record, the court will not address their arguments based on the insufficiency of the evidence of an

established policy or practice by CAIU that would be the root of any actionable conduct. The court will address Defendants' legal argument that, in order for CAIU to be liable due to a policy maker's decision, the policy maker needs to act with conscious awareness that his actions might result in the deprivation of a constitutional right. Defendants cite Board of the County Comm'rs v. Brown, __ U.S.__ , 117 S. Ct. 1382 (1997) for this proposition. Brown involved a claim under Section 1983 against a municipality; the theory of recovery was that the municipality was liable for injuries caused due to the use of excessive force used by a police officer. See id. at 1386. The municipality's liability rested solely on the sheriff's facially lawful hiring and training of the police officer. See id. at 1389. The Supreme Court held that a municipality is not liable unless "the municipality itself is the `moving force' behind the plaintiff's deprivation of federal rights."Id. at 1386 (quoting Monell v. New York City Dep't of Social Services, 436 U.S. 658, 694 (1978)). "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Id. at 1388. The Court stated that action taken by the municipality's authorized decision maker that violates federal law leads to the conclusion that the municipality acted culpably and was the moving force behind the injury. See id. at 1389. Since the action taken by the sheriff in Brown did not violate federal law, The Court addressed the question of whether a single facially lawful decision could give rise to municipal liability. The Court cautioned that, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." Id. In such a situation, a plaintiff "must demonstrate that the municipal action was taken with

'deliberate indifference' as to its known or obvious consequences." Id. at 1390 (quoting City of Canton Ohio, Ohio v. Harris, 489 U.S. 378, 388 (1989)). The Court noted that "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Id. at 1391. Because the plaintiff did not demonstrate that the sheriff's hiring decision "reflected a conscious disregard for a high risk that [the police officer] would use excessive force in violation of [the plaintiff's] federally protected right," the Court held that no municipal liability existed. Id. at 1394.

Brown does not support Defendants' argument that CAIU is devoid of liability. This is not a situation in which CAIU's decision maker acted in a facially lawful manner. Rather the unlawful actions in the instant case stemmed from the actions of the executive director of CAIU. Following the reasoning of Brown, the unlawful action of CAIU's highest officer is sufficient action to infer a violation by CAIU itself. The court need undertake the analysis pertinent to a facially lawful decision because , in the instant case, there was no facially lawful decision made by CAIU's executive director. Therefore, the court will deny Defendants' motion as to CAIU's liability.

2. Civil Conspiracy Claim

Defendants argue that the jury verdict in favor of Dorothy Boyanowski and against Nagle and Fry on her claim of conspiracy to tortuously interfere with her contract cannot stand based on legal standards. Defendants argue that, since Nagle and Frye were found not to have tortuously interfered with her contract, the jury could not have found that they conspired to do so. Additionally, Defendants argue that, in the absence of an actual tortious interferenee with contract, there are no legal damages, a necessary element of the civil conspiracy claim. Finally, Defendants argue that Nagle and

Frye should be accorded immunity under Pennsylvania's Political Subdivision Tort Claims Act and as high public officials.

Defendants also argue that there was insufficient evidence for the jury's verdict on this claim, which the court cannot address without a transcript.

Defendants first argue that it was error for the jury to find against Nagle and Frye on the civil conspiracy claim when Nagle and Frye were found not to be liable for tortious interference with contract. In support of their argument, Defendants cite two cases which stand for the proposition that, "absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." Pellagatti v. Cohen, 536 A.2d 1337, 1342 (Pa. Super. 1987). In both cases that Defendants cite in support of their argument, the court dismissed the civil conspiracy claims because the complaints failed to state a claim. See id. (Finding litigant conceded lack of underlying cause of action); Rose v. Wissinger, 439 A.2d 1193, 1199 (Pa. Super. 1982) (finding no basis for underlying cause of action). In the instant case, the complaint sufficiently stated a claim for tortious interference with contract. Nagle and Frye were ultimately found not to be liable on this claim, but the jury found them liable on the civil conspiracy claim. Defendants cite no cases holding that a litigant must prevail on the underlying tort in order to recover for civil conspiracy. As such, the court will not grant Defendants relief on this argument.

Defendants next argue that Dorothy Boyanowski is unable to demonstrate actual legal damages, a necessary element of a civil conspiracy claim. Defendants state that Dorothy Boyanowski cannot demonstrate actual damages since the jury found that no tortious interference with her contract had occurred. It is true that a plaintiff must demonstrate actual

legal damages in order to recover for civil conspiracy. See Pelagatti, 536 A.2d at 1346. The court instructed the jury as such and further instructed that it "shall award actual damages only for those injuries which you find plaintiffs have proven by a preponderance of the evidence to have been the direct result of the conducts of the defendants." (Jury Charge at 19, 23.) The jury awarded Dorothy Boyanowski damages pursuant to the jury instructions. Defendants do not cite any cases that stand for the proposition that legal damages for civil conspiracy are only those damages that result from the underlying tort. Civil conspiracy is a separate tort, and the court finds no reason to hold that damages cannot flow from the civil conspiracy itself. As such, the court will not disturb the jury's verdict on damages.

Defendants' immunity arguments rest on Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. 8541 et seq. and their status as high public officials. Immunity under the Political Subdivision Tort Claims Act is not available to an employee whose conduct constitutes wilful misconduct. 52 Pa. Cons. Stat. 8550. Willful misconduct exists when an actor desired to bring about the result that followed from his actions or at least was aware that is was substantially certain to follow, so that desire can be implied. See Williams v City of Philadelphia, 569 A.2d 419, 421 (Pa. Commw.Ct. 1990) (quoting Evans v. Philadelphia Transp. Co., 212 A.2d 440, 443-44 (Pa 1965)). It is synonymous with the term "intentional tort." See Renk v. City of Pittsburgh, 641 A.2d 289, 292 (Pa. 1994). Given that the jury could have reasonably inferred willful misconduct on the part of Nagle and Frye, the court rejects Defendants' immunity argument based on the Political Subdivision Tort Claims Act.

Likewise, the court rejects Defendants' arguments that Nagle and Frye should be granted absolute immunity as high public officials. The doctrine of absolute immunity for high public officials is a Pennsylvania common law doctrine that:

> exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, provided the statements are made or the actions are taken in the course of the officials duties or powers and within the scope of authority... The doctrine of absolute privilege rests upon the ...idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.

Linder v. Mollan, 677 A.2d 1194, 1195 (Pa. 1996) (internal quotations and citations omitted). The determination of whether an individual qualifies as a high public official is made on a case basis and depends on "the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." Montgomery v. city of Philadlephia, 140 A.2d 100, 105 (Pa. 1958). Some examples of high public officials are township supervisors, mayors, city comptrollers, and district attorneys. See Linder, 677 A.2d at 1198-99. Some examples of positions that are not high public officials are police officers, high school principals, and school district employees. See id, at 1197 n.2. Apart from Defendants' bare assertion that the executive director and acting executive director of CAIU are similar to a mayor or school superintendent, Defendants do not demonstrate that Nagle and Frye hold important policy-making public positions that should afford them status as high public officials. Therefore, the court will not accord Nagle or Frye absolute immunity as high public

officials.

3.) Amount of Damages

Defendants argue, both in their renewed motion for judgement as a matter of law and in their motion for a new trial, that the amount of damages was excessive, speculative, and without basis in law or evidence. Plaintiffs contend that the verdict is well-supported by the record. "[I]f the judge is not convinced that there has been a miscarriage of justice, then it is his or her duty to respect the jury's verdict. for a court to disturb a jury verdict, the damages assessed by the jury must be so unreasonable as to offend the conscience of the Court." Waldorf v. Shuta, 916 F. Supp. 423, 425-26 (D.N.J. 1996) (internal citations omitted), aff'd ___F.3d____, 1998 WL 173103 (3d Cir. Apr. 15, 1998). In the absence of a trial record of review, the court will not disturb the jury verdict.

A. Motion for a New Trial

Defendants allege several reasons why the Court should grant a new trial: (1) the verdict was against the weight of the evidence, shocked the conscience and resulted in a miscarriage of justice; (2) Defendants were substantially prejudiced by evidentiary errors at trial; (3) the jury instructions were defective; and (4) damages were excessive, speculative and without basis in law or evidence.

1.) Jury Verdict and the Weight of the Evidence

Defendants argue that the verdict goes against the weight of the evidence. The Court has discretion to grant a new trial on this ground "only if the jury's verdict resulted in a "miscarriage of justice" or where the verdict cries out to be overturned or shocks our conscience. Griffiths v. CIGNA Corp, 857 F. Supp, 399. 399, 411 (E.D. Pa. 1994) (citing Williamson v. Consol, Rail Corp, 926 F.2d 1344, 1353 (3d Cir 1991), aff'd, 60 F.3d 814 (3d cir. 1995). The Court does not find that the standard has been met in the instant case and will not order a new trial based on this argument.

2.) Evidentiary Rulings at Trial

Defendants next argue that the court erred in its evidentiary decisions. a motion for a new trial on the basis of alleged trial error will be granted when (1) an error was in fact made, and (2) the error was so prejudicial that refusing to grant a new trial is inconsistent with substantial justice. See Bhaya v. Westinghouse Elec. Corp., 709 F.SUPP. 600, 601 (E.D. Pa. 1989), aff'd 922 F.2d 184 (3d Cir 1990). For evidentiary errors, "a new trial must be granted unless "it is highly probable that [the erroneous ruling] did not affect the [objecting party's] substantial rights," Id. (quoting McQueeney v. Wilmington Trust Co., 799 F.2d 916, 928 (3d Cir. 1985)).

Defendants fourth argument was also raised in their motion for judgement as a matter of law, and the court covers this argument in Section III(A)(3), supra.

Defendants argue that the following evidentiary errors were made: (1) the court precluded the testimony of Nagle and Thomas Holtzman regarding the discussions about Donald Boyanowski during Superintendent Council and CAIU Board meetings; (2) the court admitted testimony of George Zimmerman that he felt threatened by conversations he had with Nagle and Frye; (3) the court admitted testimony of Dorothy Boyanowski regarding her damages, which Defendants contend is hearsay; and (4) the court permitted Jean Winters to testify regarding communications about her permission to hire Dorothy Boyanowski.

Defendants assert that Nagle and Thomas Holtzman's testimony regarding discussions about Donald Boyanowski at meetings should not have been precluded as hearsay. Defendants assert that the court precluded discussions of whether Donald Boyanowski violated the Pennsylvania Ethics Act, Boyanowski's allegedly derogatory statements about CAIU, and CAIU contractors' comments that Boyanowski instructed them to "pad" miles. Defendants argue that the

statements were not hearsay because they were not offered for the truth of the matter asserted and that preclusion of the statements was prejudicial to Defendants because the statements were relevant to Defendants' states of mind, intentions, and degrees of culpability. Plaintiffs contend that the Court properly excluded hearsay, matters of opinion and irrelevant testimony. Defendants did not supply the court with an excerpt of the trial testimony, through which the court can review the context of its rulings at trial, and, thus have failed to meet their burden of demonstrating that the rulings were in error. The Court will deny their motion for a new trial on this ground.

Defendants next argue that the court erroneously admitted testimony by George Zimmerman that he felt threatened by conversations he had with Nagle and Frye. Defendants contend that this testimony; (1) was not relevant; (2) had only the intent of demonstrating prior bad acts to prejudice the jury; (3) did not describe anything that could constitute a threat to form the basis of his feelings; and (4) was "fruit of the poisonous tree" because Plaintiffs learned of the testimony through improper ex parte contacts with William Jacobi, another CAIU employee. Prior to trial, Defendants filed a motion in limine seeking to preclude Zimmerman's testimony. The court denied the motion and allowed Zimmerman to testify, with the restrictions that he could not testify as to any conversations he had with Jacobi or heard by Jacobi, based on Plaintiffs' counsels' actions towards Jacobi. See May 21, 1997 Memorandum and Order. therefore, the Court has already decided the relevance of Zimmerman's testimony and fashioned a remedy regarding any ex-parte contacts. Defendants proffer no persuasive arguments to overturn this decision. moreover, while Defendants' post trial motion asserts that Zimmerman's testimony is insufficient to support his conclusion that he felt threatened. Defendants have not supplied the court with a transcript to support this

contention. Therefore, the Court will deny Defendants' motion as it pertains to Zimmerman's testimony.

Defendants contend that Dorothy Boyanowski's testimony regarding her damages was hearsay and that the court should have precluded this testimony. Defendants do not support their argument with citations to the record. Therefore, they have not demonstrated that her testimony was hearsay. moreover, it appears that an individual would have knoweldge of her salary and be competent to testify as to her damages based on that salary.

Defendants' final argument regarding errors at trial is that the court erroneously allowed Jean Winters to testify regarding communications between her and her husband and CAIU officials and what she learned from her husband about whether she was permitted to hire Dorothy Boyanowski. Again, Defendants do not support their argument with a transcript for the court to review its decision regarding Winter's testimony. As such, the court will not disturb its prior ruling.

3.) Jury Instructions

Defendants argue for a new trial due to defects in the jury instructions. "In reviewing jury instruction when error has been alleged, a new trial will be required only if the instructions, taken as a whole, give a misleading or inadequate understanding of the law and the issues to be resolved." Malley-Duff & Assocs., Inc. v. Crown Life Ins.Co. 734 F.2d 133, 147 (3d Cir 1984).

Defendants assert that the court erred in refusing to instruct the jury:(1) on common law privilege concepts to be applied to the substantive due process claim; (2) that CAIU liability must be premised on an official's conscious awareness that federal rights would be violated; (3) that normal effects of defamation of future employment opportunities do not support a substantive due process claim; (4) on the statutory structure of CAIU and its relationship to school districts. Defendants also assert that the court erred in instructing the jury:(1) that

"stigma plus" can be the basis for a substantive due process claim; (2) as to punitive damages.

Defendants cite no case law holding that state common law privileges are affirmative defenses for federal substantive due process claims. Even if the court were to assume, arguendo, that a privilege may apply to Defendants' actions, the court notes that a party may not receive the protection of a common law privilege if the privilege is abused. See Rest. (Second) of Torts §599. The court instructed the jury that, in order to find that Defendants violated Plaintiffs' substantive due process rights, they had to find that Defendants' acts "deliberately, arbritarily and capricously". (Jury Instr. at 14) As such, a finding that Defendants violated Plaintiffs' substantive due process rights would necessitate a finding of abuse of any conditional common law privilege and Defendants would not be protected by the privilege. Therefore, the Court committed no error in refusing to include common law privileges in the substantive due process instruction.

The court discussed the applicability of Brown in section 111(A)(1), supra. Based on the reasons contained therein and the conclusion that there was no facially lawful decision in the instant action, the court determines that it was not error to fail to instruct the jury that a policy-making official must have acted with conscious awareness that specific federal rights were violated.

Defendants state that it was error for the court to fail to instruct the jury that the normal effects of defamation on future employment opportunities does not support a substantive due process claim and that it was error for the court to instruct the jury that "stigma plus" can be a basis for substantive due process liability. In its jury instructions, the court stated that, "you are advised that there is no constitutionally protected right to obtain future government contracts, and that suspension or debarment from bidding on government contracts may be a basis for liability only if it is based upon a charge of fraud or

dishonesty." (Jury Instr. at 14) As discussed in section III(A)(1), supra, this charge meets the legal standards for substantive due process and was not in error.

The court refused Defendants' proposed jury instruction involving the statutory structure and legal relationship of CAIU to member school districts. The court determined that this proposed instruction, encompassing over three typed pages, was unnecessary for resolution of the issues in the case. Defendants' bare allegation of error in their post trial brief does not persuade the court otherwise.

Given the court's holding granting Nagle qualified immunity, the court need not address Defendants' argument that there was no "outrageous" conduct justifying a punitive damage instruction.

The court finds that the jury instructions, taken as a whole, were not misleading or inadequate. Therefore, the court will deny Defendants' motion for a new trial based on the jury instructions.

IV Conclusion

The court will deny Defendants' motion for judgement as a matter of law as it relates to the substantance of Plaintiffs' claims. The court will, however, grant the motion to the extent that it requests qualified immunity for Nagle on Plaintiffs' substantive due process claims. The court will deny in its entity Defendants' motion for anew trial. An appropriate order will follow.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: April 27, 1998

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD E. BOYANOWSKI: individually; BOYO TRANSPORTATION SERVICES INC., DOROTHY: A. BOYANOWSKI; and MICHAEL P. LABALOKIE	:	**CIVIL NO.1:CV-94-1252**
Plaintiffs	:	
v.	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN E. NAGLE; ED FRYE; ROGER MORRISON; MARK BAUER; and THE WEST PERRY SCHOOL DISTRICT	:	
Defendants	:	

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT**:

1.) Defendants' post trial motion for judgement as a matter of law is **GRANTED IN PART**, in that Defendant Nagle is accorded qualified immunity with respect to Plaintiff's substantive due process claims.

2) Defendants' post trial motion for judgement as a matter of law is **DENIED IN PART**, in that the motion id denied in all other respects.

3) Defendants' motion for a new trial is **DENIED**.

4) The clerk of court shall amend the amended judgement, document number 178, to reflect each of the jury's verdict findings, with the alteration of entering judgement in favor of Defendant Nagle on Donald Boyanowski's substantive due process claim.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: April 27, 1998

APPENDIX "C" - MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT DATED MAY 21, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD E. BOYANOWSKI individually, and DONALD E. BOYANOWSKI, t/d/b as BOYO TRANSPORTATION SERVICES, INC.; DOROTHY A. BOYANOWSKI; and MICHAEL P. LABALOKIE	:	CIVIL ACTION NO. 1:CV-94-1252
Plaintiffs	:	
v.	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN E. NAGLE; ED FRYE; ROGER MORRISON; MARK BAUER; and THE WEST PERRY SCHOOL DISTRICT,	:	
Defendants	:	

MEMORANDUM

Before this Court are two motions in limine filed by Defendants. One motion seeks to preclude information obtained through ex-parte contacts with a William A. Jacobi. The other motion seeks to preclude testimony in which George Zimmerman is purported to state that he felt threatened by Defendants Frye and Nagle.

Motion In Limine Regarding William A. Jacobi

William A. Jacobi is the Supervisor of Data Processing with Defendant Capital Area Intermediate Unit. Mr. Jacobi approached Plaintiffs' counsel and requested a meeting which subsequently took place. At that meeting Jacobi shared with Plaintiffs' counsel personal notes Jacobi took of meetings, conversations and events surrounding this suit. This was unknown to defense counsel until a short time before the taking of Jacobi's deposition. While attempting to prepare Jacobi for his deposition, counsel became aware of Jacobi's contact with Plaintiffs' counsel. Jacobi became uncooperative and refused to provide defense counsel with his notes. His refusal was on the advice of Plaintiffs' counsel.

The Supreme Court of Pennsylvania has adopted Rule 4.2 of the Model Rules of Professional Conduct, which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(Emphasis added.)

The Official Comment to Rule 4.2, which explains what is meant by a "party" where, as here, an institutional defendant is involved, provides:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(Emphasis added.)

It is unclear where Jacobi falls into the emphasized wording. He sits in on meeting with his two immediate supervisors and sits in on strategic planning sessions. (Transcript of Jacobi Deposition at p. 53.) The area of ethical conduct is uncertain.

In Cagguila v. Wyeth Laboratories, 127 F.R.D. 653 (E.D. Pa. 1989), Judge Van Antwerpen stated that "[i]n such an uncertain area of ethical conduct, we believe that a prudent attorney would have given notice to opposing counsel of the intent to take such a statement." Id. at 654.

In University Patents, Inc. v. Klegman, 37 F. Supp. 325 (E.D.Pa. 1990), Judge Waldman stated:

> There is a difference between doing something one believes to be proper and later learns is not when a court

> rules on a previously unsettled point, as in Hammad, and doing something the propriety of which one knows is in doubt. Rather than informing opposing counsel of his intent to talk with University employees or seeking leave of court to do so, Mr. Morrison imprudently proceeded with the interviews unilaterally without regard for the potential legal and ethical ramifications.

Id. at 329 (citations omitted).

This court believes that Plaintiffs' counsel had a duty to notify defense counsel of Jacobi's contact. Plaintiffs' counsel was clearly out of line in advising Jacobi not to cooperate with his employer's counsel.

All other arguments raised by Plaintiffs' counsel are rejected.

Motion In Limine Regarding George Zimmerman

This Court finds that George Zimmerman's state of mind is quite relevant in this case. Therefore, the motion will be denied except as to any conversations Zimmerman may have had with Jacobi overheard and noted.

An appropriate order will be issued.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: May 21, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD E. BOYANOWSKI individually, and DONALD E. BOYANOWSKI, t/d/b as BOYO TRANSPORTATION SERVICES, INC.; DOROTHY A. BOYANOWSKI; and MICHAEL P. LABALOKIE	:	**CIVIL ACTION NO. 1:CV-94-1252**
Plaintiffs	:	
v.	:	
CAPITAL AREA INTERMEDIATE UNIT; JOHN E. NAGLE; ED FRYE; ROGER MORRISON; MARK BAUER; and THE WEST PERRY SCHOOL DISTRICT,	:	
Defendants	:	

ORDER

In accordance with the accompanying memorandum. **IT IS HEREBY ORDERED THAT:**

1.) The motion in limine regarding William A. Jacobi is granted. William A. Jacobi shall not be permitted to testify at trial; his deposition shall not be used; and his notes and the

information derived from his notes shall not be used.

2.) The motion in limine regarding George Zimmerman is denied, except to the extent that paragraph 1 of this order applies.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: May 26, 1997